No. 10705.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DIESEL SCREW "BETSY ROSS," PETER CEKALOVICH, DOMINIC MRATINICH and FRANK MULJAT,

Appellants and Cross-Appellees,

vs.

STEVE RULJANOVICH,

Appellee and Cross-Appellant.

BRIEF OF APPELLEES ON CROSS APPEAL OF STEVE RULJANOVICH.

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Preliminary Statement.

Cross-appellant, Steve Ruljanovich, set forth in the third amended libel a third cause of action predicated upon the provisions of the Jones Act (46 U. S. C. A. 688; Ap. 22-24). After a trial the District Court found that the said Steve Ruljanovich was not entitled to any recovery by reason of his third cause of action. (Ap. 35.) A decree was therefore entered in favor of the cross-appellees on said third cause of action (Ap. 39).

There is only one question presented for decision: Does the evidence indicate that the cross-appellees were, or any of them was, guilty of any negligent act or omission as a matter of law, which proximately caused the injuries sustained by the cross-appellant?

Cross-Appellees' Reply to Cross-Appellant's Contentions.

I.

The law, of course, is well settled that an appeal or cross-appeal to the Circuit Court of Appeals in an admiralty case is a trial *de novo*.

This statement, however, is subject to the important qualification that the Circuit Court of Appeals will not disturb the findings of the trial court unless there is plain and manifest error in the findings. The mere fact that the Circuit Court of Appeals might reach a different conclusion on the same set of facts is of no importance, if the findings have support in the evidence. (*The Mabel* (C.C.A. Cal.) 61 F. (2d) 537; *Wandtke v. Anderson* (C.C.A. Cal.) 74 F. (2d) 381.)

It is also well settled that where the evidence is conflicting there is a presumption of the correctness of the findings of fact by the trial court who has seen and heard the witnesses. The burden before the appellate court is on the appellant to overcome such a presumption (*The Adriana,* 6 F. (2d) 860; *The District of Columbia,* 74 F. (2d) 977; *The Ellenville,* 40 F. (2d) 47). It has been said that the trial judge passes upon the credibility of the witnesses and that his findings are entitled to great weight, particularly where the evidence is conflicting (*Siciliano v. Calif. Sea Products Co.* (C.C.A. Cal.) 44 F. (2d) 784; *Gorman Leonard Coal Co. v. Peninsular State Corp.,* 66 F. (2d) 83.)

II.

Cross-appellant asserts that the evidence is conclusive upon the proposition that his injury occurred by reason of the negligent act of the respondent Frank Muljat. Cross-appellant then purports to set forth *all* of the evidence upon this subject. Brief excerpts are then taken from the testimony of the witness Gibson and the witness Muljat.

The cross-appellant has not, by any stretch of the imagination, set forth all of the testimony bearing upon the subject of the alleged negligence of the respondent Muljat and he has likewise failed to set forth any of the reasonable inferences which might justifiably be drawn by the trial court from the testimony of the various witnesses.

It is asserted by the cross-appellant that the witness Neal D. Gibson was a *disinterested* witness. That this is far from the truth is demonstrated by the record. Furthermore, the trial judge saw and heard Gibson testify and was in a position to accurately evaluate his testimony. Gibson was the warehouse foreman employed by the Crescent Warehouse Company (Ap. 142), whose negligence is alleged in the third amended libel to have co-joined with that of the respondent Muljat to cause the injuries of which libellant complained in said third amended libel. In the verified third amended libel, the cross-appellant alleged:

> "That the said accident, as set forth in paragraph Third of libellant's First Cause of Action, and made a part hereof by reference, was caused, without any

contributing fault or neglect on the part of libellant, and as a proximate result of the combined negligence of the Crescent Warehouse Company, and the negligence of Frank Muljat, part owner and member of the crew of the Diesel Screw 'Betsy Ross,' * * *." (Ap. 23.)

The record further demonstrates that the libellant had commenced a civil action at law for damages, in the Superior Court of the State of California, in and for the County of Los Angeles, Long Beach Division thereof, against the Crescent Warehouse Company, in connection with the identical injuries which are the subject matter of this litigation (Ap. 184). The record does not indicate that this action against the Crescent Warehouse Company has ever been disposed of and proctor for cross-appellant will not deny to this Honorable Court that this action is still pending before the courts of the State of California. Under the circumstances, therefore, it seems most strange that Gibson could be called a disinterested witness when everything that he would testify to would be calculated to exculpate himself and his employer from a charge of negligence.

The libellant has merely set forth a fragment of Gibson's testimony. A careful analysis of Gibson's testimony indicates the following, with reference to the physical conditions at the place of the accident:

1. That a 16 to 18 foot 4 by 4 timber had been allowed to remain against the wall of the warehouse owned by the Crescent Warehouse Company for at least a month before the accident. (Ap. 142.)

2. That this timber was almost parallel with the wall —that its base was approximately a foot and a half from the wall. (Ap. 142.)

3. His testimony in conjunction with Respondents' Exhibit A which was a photograph of the interior of the warehouse, indicates that the 4 by 4 which fell was within a foot or so of an almost identical 4 by 4 which was fastened to the wall and which was a part of the permanent structure comprising the warehouse. (Ap. 144.)

4. The particular 4 by 4 in question had not been fastened either at the top or the bottom and was held in place by gravity alone. (Ap. 144.)

5. That it was dark at the place where the timber was located. (Ap. 148-149.)

On his direct examination, Gibson testified with reference to the conduct of Frank Muljat, in part, as follows:

> "Q. When this man got up on the truck what, if anything, did he do with his left hand? A. With his left hand he sort of assisted himself by taking hold of this 4 by 4.
>
> Q. What happened to the 4 by 4 then? A. *He immediately pulled on it,* setting it in motion, and it fell over." (Ap. 140.)

On cross-examination, however, the same witness testified as follows:

> "Q. You *saw* him pull that 4 by 4 as he got up on the truck? A. I saw the 4 by 4 move. *I couldn't see him, as to any pulling,* but I saw the 4 by 4 move when he did it." (Ap. 147.)

We have a witness therefore who in one breath says that he saw Muljat pull on the 4 by 4 and in the next breath says that he couldn't see him as to any pulling. The statement that he saw the 4 by 4 move when he "did it" does not have reference, it is submitted, to any

possible pulling on the timber, since the witness testified that he could not see him pull on the timber, but has reference to the act of getting up on the truck.

It is obvious that Gibson assumed that because the 4 by 4 fell as Muljat was getting up on the truck that he must of necessity have pulled it over.

Muljat, as well as all of the other fishermen, were strangers on the premises and were all invitees of Gibson and the Crescent Warehouse Company. At no time did Gibson or anyone connected with the Crescent Warehouse Company warn Muljat or any of the seamen that the 4 by 4 was not affixed to the premises. (Ap. 148.)

That Gibson appreciated the danger, however, involved in the timber's presence because of his superior knowledge of its presence and the fact that it was not fastened and was loose, is indicated by the following testimony:

> "Q. Prior to the time he (Muljat) jumped up onto the truck you saw he was pretty close to the end of the concrete dock there, didn't you? A. Yes, sir.
>
> Q. Did you yell out a warning to anybody? A. I yelled, 'Look out!'
>
> Q. Did you warn this crew member before he attempted to get up onto the truck, that there was a loose 4 by 4 standing there right next to his member that allows the sliding door to go up and down? A. No, sir; I did not think he had no business on there until the truck was ready for him to put on the net.
>
> Q. In other words, you never at any time warned anyone of the fact that this timber was not fastened in the right manner? A. No, sir, I did not have time to." (Ap. 148.)

The crux of the entire matter is indicated by Gibson's testimony as follows:

> "Q. Before you opened the door, of course, the truck was on the outside, and you made no effort at that time to attempt to move this 4 by 4 timber, did you? A. No, sir; *it was dark in there; I couldn't even see it, in fact.*
>
> Q. You couldn't even see it? A. Not very plain.
>
> Q. Despite the fact, however, that you knew it had been there a considerable period of time? A. *It had been there so long that I had forgot about it.*" (Ap. 148-149.)

If the Court will examine the photographs which are in evidence as Respondents' Exhibits B, C and D, it will be apparent that the 4 by 4, when viewed by a person unfamiliar with the premises, was to all intents and purposes a part of the solid structural frame work of the building. The Court should also keep in mind the fact that the photographs were obviously taken with a flash bulb and at a time when there was a maximum amount of light, whereas the testimony of Gibson indicates that the 4 by 4 could not be plainly seen.

The testimony of Muljat does not indicate that he ever touched the timber in question. Muljat testified as follows:

> "I jumped on the truck. I don't recall whether I place my hand against the wall or not. If I did, I didn't see any timber there; and I just jumped on the truck." (Ap. 198.)

There is nothing in the foregoing testimony which would charge the respondent Muljat with any negligence or which would at all indicate that he was responsible for the fall of the timber.

Much is made by cross-appellant of the purported admission of the respondent Muljat. He testified, in part, as follows:

> "I don't recall putting my hand against the wall, but since I got on the truck I *thought* maybe that would be the only reason the thing fall, and I did say maybe it was my fault the plank fall, *I thought*. That was all I said." (Ap. 200.)

An analysis shows that although Muljat didn't know whether he touched the timber, he concluded from the mere fact that the timber fell almost coincidentally with his jumping on the truck, that *he must have had something to do with its falling*. The admission was made in the car, at a time when the cross-appellant was bleeding profusely and when everybody was excited and concerned about his welfare.

Furthermore, cross-appellant has refrained from setting forth *any* of the testimony of the witness Nick Karuza, who was certainly more disinterested than the witness Gibson and who was watching the conduct of both Gibson and Muljat at the time of the accident. Karuza testified, in part, as follows:

> "Q. Did you observe Mr. Gibson get up on the truck? A. Yes, I saw him.
>
> Q. At that time, would you tell me where Mr. Muljat was? A. He first jumped, Mr. Gibson; then Mr. Muljat followed right away in the same truck after him.
>
> Q. You mean by that that Mr. Gibson jumped up on the body of the truck, and Mr. Muljat followed him immediately? A. Yes.
>
> * * * * * * * * *

Q. By Mr. Kappler: How did he (Gibson) get up onto the truck? A. When he jumped he touched the corner with his hand.

Q. He touched the corner with his left hand? A. His left hand, yes, when he jumped.

Q. How did Mr. Muljat get up onto the body of the truck? A. The same thing, both; he followed him.

Q. The same thing Mr. Gibson did? A. Yes." (Ap. 192-193.)

From the foregoing it is apparent that Gibson jumped up onto the truck and that Muljat immediately followed in the same manner. This, of course, is in direct conflict with the testimony of Gibson as to the manner in which he got up onto the truck.

The truck driver, who is not shown to have been a member of the crew of the "Betsy Ross" or in any manner connected with the cross-appellees, had difficulty in backing the truck into the warehouse. (Ap. 138.) Respondent Muljat testified that the truck hit the side of the building. An examination of the photographs introduced in evidence by respondents reveal numerous marks on the concrete at the entranceway to the building and it is entirely possible that the timber may have been caused to fall by reason of the fact that the truck struck the building, and jarred the timber away from its position up against the wall.

Cross-appellant assumes that Muljat pulled the timber over. It is submitted that the record is in conflict on this proposition and that the trial court was amply justified in concluding that Muljat did not pull the timber over.

In any event, cross-appellees insist that even if it be assumed that Muljat pulled the timber over, this would not establish that Muljat was guilty of negligence.

> "Damages may be recovered under the Jones Act only for negligence."
>
> *De Zon v. American President Lines,* 218 U. S. 669 at 671, 87 L. Ed. 1065 at 1073;
>
> *Jamison v. Encarnacion,* 281 U. S. at 639, 74 L. Ed. 1084, 30 NCCA 197.

Negligence is the failure to exercise ordinary care under the circumstances. Can this court say, as a matter of law, that the cross-appellee Muljat, even if he did pull the timber over, did not act as a reasonably prudent person under the circumstances, particularly where no one had warned him that the timber, almost three times the height of an ordinary man, was not affixed in some manner to the building, where the evidence indicates that the 4 by 4 timber appeared to all intents and purposes to be a part and parcel of the structure itself?

It is settled law that under the Jones Act the employer is not held absolutely responsible to furnish employees with a safe place in which to work but is only bound to exercise reasonable care to see that the place is reasonably safe. (*Voljkovich v. Ursich,* 49 Cal. App. (2d) 268; *Baltimore & Ohio etc. Co. v. Carroll,* 280 U. S. 491, 74 L. Ed. 566; *Seaboard A. L. R. Co. v. Horton,* 233 U. S. 492, 58 L. Ed. 1062.

The evidence, of course, is undisputed that the cross-appellees merely stored the fishing net on the premises of the Crescent Warehouse Company. As invitees on the premises they were entitled to assume that the Crescent Warehouse Company had not been guilty of negligence

in and about the maintenance of the premises which would be likely to cause injury to the respondents or any of the other invitees. The respondents were not in control of the premises and would have no power to take steps of their own in order to attempt to in any manner change the condition of the premises. The general rule is that a master is not liable for injuries to his servant by reason of defects in appliances or places of work which are furnished by or are under the control of a third person. (*Foster v. Conrad,* 261 F. 603; *Lehigh etc. Coal Co. v. Sawickas,* 247 F. 432; *Haan v. Darnell,* 246 F. 943.)

Conclusion.

It is respectfully submitted that the trial court was amply justified in concluding that the cross-appellee, Frank Muljat, was not guilty of any negligent act or omission proximately causing any injury to the cross-appellant. This Court, applying the well established rules on admiralty appeals, should not disturb the findings of fact of the trial court which are amply supported by the evidence.

It is respectfully submitted that the decree should be affirmed.

Dated, Los Angeles, California.

HENRY E. KAPPLER,
Proctor for Cross-Appellees.